

August 8, 2003

Comments Regarding Proposed Nationwide Agreement
Regarding the Section 106 National Historic Preservation Act Review Process

1. OHPO strongly recommends that FCC sponsor regional training sessions regarding the use and interpretation of the proposed Nationwide PA, because it will be by far the most complicated Nationwide Agreement executed to date. We experienced wide variability in project reviews after the Collocation PA was executed and found that the guidance on its use was not issued in time to offer vital assistance to SHPOs, Carriers and Consultants.
2. FCC and ACHP should issue guidance regarding the treatment and use of existing state guidelines for communications facilities and how they will be affected by the implementation of this PA.
3. Public access to how historic properties were considered will not be readily available for many projects, especially those excluded from review by the Collocation PA and the proposed Nationwide PA

In general, at any point in this PA where the public or additional consulting parties are mentioned, we urge FCC to strengthen their ability to be given information in a timely way and to have access to the process early enough to make informed comments. There needs to be clear procedural steps for the public to follow that will allow them to obtain project information about any telecommunications structures covered by the proposed Nationwide PA and the Collocation PA. For instance, Stipulation I.B of the proposed Nationwide PA implies that any person may challenge whether a particular project is determined to be an undertaking, but there is no direction as to how that challenge should occur. There should be in this agreement a clear process for the public to follow that will provide opportunities to ask questions about specific projects.

In addition, it will be very difficult for the public to obtain basic information about projects with which they have concerns if those projects are exempted from review under Stipulation III of the proposed Nationwide PA. Only the carriers who assess the applicability of the procedural exclusions will know their basis, since there is no monitoring of the use of these exclusions provided for in this PA. Without taking the risk of trespassing to gain registration information, the public will have no ability to find out whom they should contact for more information about effects to historic properties that might be occurring at a specific site. OHPO strongly recommends mandatory annual reporting of basic information about the use of exclusions to FCC, SCHP, and/or individual SHPOs, to include minimally the site address, UTM/lat-long coordinates, tower owner, carrier name, date of exclusion, and basis for exclusion. With this basic data supplementing the SHPO files for reviewed sites, the public can readily gain access to information about how historic properties were considered under this PA and decide whether they wish to take action under Stipulation XI. In addition, the FCC, ACHP and NCSHPO will be able to more effectively evaluate the successful implementation of the PA as it relates to use of exclusions.

In Stipulation V.F, Applicants are delegated the ability to grant consulting party status to interested individuals or groups. OHPO requests that SHPOs be notified of all such consulting party requests, in order to ensure that the interests of the public in project consultation can be fully considered.

4. Tower replacements should not exempt from review unless existing tower can demonstrate previous 106 compliance (III.A.2)

A significant number of towers were built without compliance with Section 106 and it is not known whether they affect historic properties. This issue was previously addressed through the

implementation of the Nationwide PA for Collocation of Wireless Antennas. The Collocation PA was intended to facilitate the construction of additional antennas at existing sites that were unlikely to affect historic properties, as well as to discourage the construction of many additional unneeded towers that would tend to cumulatively impact historic properties. However, the exceptions to Collocation PA clearly restrict its use for towers built after March 19, 2001 or antennas mounted on or near historic properties (see IV and V in Nationwide PA for Collocation of Wireless Antennas). Allowing the replacement of towers to be fully excluded for Section 106 review under the new Nationwide PA clearly negates the agreed upon limits on recent non-compliant towers. It also allows for the wholesale construction of towers without review in areas that have previously not been considered under Section 106. OHPO recommends that Stipulation III.A.2 be amended to require review for replacement towers using Form NT for those tower sites that cannot document previous successful compliance with Section 106. OHPO has no objection to tower replacements at those sites where successful compliance can be documented, with the limits described in the proposed Nationwide PA.

5. In sections III.A.6 and VI.A, the language should be more clear that SHPOs may designate areas for exclusion from review if specifically authorized under state law

OHPO remains concerned that these Stipulations place an implied responsibility on SHPOs to designate “tower farm” areas and that this practice is beyond their authority under federal regulations. These stipulations should be altered to make it clear that this is an optional practice that may be implemented at SHPO discretion if authorized under their state regulations.

6. Tower sites at properties used for commercial purposes should not be routinely excluded

OHPO remains concerned about the broad applicability of the exclusion in II.A.4 because its use may impact important historic properties like those rehabilitated through the federal certified rehabilitation tax credit program. The limited distance requirement would allow the construction of towers 200 feet away from many income-producing properties, regardless of their historic significance. This stipulation must be revised to exclude its applicability to any building listed in the National Register of Historic Places and to increase the minimum distance to at least 400 feet.

7. Identification of Historic Properties should be conducted using the guidance published by the National Register of Historic Places and the National Park Service

OHPO requests that Stipulation VI.C.1 be amended to reference the National Register Bulletins issued by the National Register of Historic Places and other professional preservation guidance published by the National Park Service. These documents provide the benchmark for standard methods used to assess historic properties; their use will meet a more readily identifiable professional standard than the “methodology generally acceptable to the preservation profession” that is described in the proposed PA language.

8. Stipulation VI.C.4 regarding previously disturbed sites will be difficult to interpret, since it is not clear exactly how any person will be able to make a determination that a site has been impacted to such an extent that no archaeological resources are present.

This stipulation will be almost impossible to use effectively without clarification, since it could readily be interpreted to exclude areas that have a high probability of archaeological resources being present. For instance, would all areas under commercial cultivation by large-scale farm machines be considered as too disturbed to hold resources? Would major archaeological sites along streams be excluded from consideration because they occur at a depth of 3 feet instead of 2 feet? OHPO strongly recommends additional consultation regarding this stipulation with State Archaeologists from different regions in order to ensure an equitable consideration of potential effects to archaeological resources.

9. Consideration of effects in Stipulation V.E.3 is not based on current review practices and do not reflect a traditional model of considering effects under 36 CFR 800.5

OHPO objects to use of new criteria to consider adverse effects to historic properties. It has been our experience that diverse projects from many federal agencies have been successfully evaluated using the “Criteria of Adverse Effect” found in 36 CFR 800.5 and we see no compelling reason to alter this basic premise of the Section 106 regulations for telecommunications projects. If FCC, ACHP or NCSHPO has concerns regarding the interpretation and use of these Criteria for telecommunications projects, we strongly suggest that professionally-oriented policy guidance would be a more effective method of ensuring consistent application of the Criteria by individual SHPOs, Carriers and Consultants than by altering this standard regulatory premise.

10. SHPOs must have the same ability to seek assistance from FCC as Applicants and ACHP should assist in resolving project disputes between SHPOs and FCC

The proposed PA provides Applicants with the ability to seek assistance from FCC in the event of a disagreement with SHPOs (see VII.B.4, VII.C.4). SHPOs must have the same ability to request assistance from FCC, since there appears to be no other avenue for SHPOs to seek dispute resolution for difficult projects. We are disturbed that the current language implicitly represents SHPOs as being obstructive to resolution of project disputes, when the process of consultation should put all consulting parties on a much more equal footing. Given the difficulties that might arise in the implementation of this major new PA, it also seems reasonable to expect that at some point in time a SHPO and FCC might have a complex project or a procedural dispute. OHPO requests that an additional administrative stipulation be added to the proposed PA that would allow SHPO or FCC to seek assistance from ACHP in resolving issues related to complex projects or procedural disputes, so long as the Criteria for Council Involvement found in Appendix A to 36 CFR 800 are met.

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